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Supreme Court of the United States

OCTOBER TERM, 1944.

No. 1190.

SOCIETE INTERNATIONALE FORESTIERE ET MINIERE DU CONGO and COMPANHIA DE DIAMENTES DE ANGOLA,

Petitioners,

vs.

UNITED STATES OF AMERICA

Respondent.

BRIEF OF PETITIONERS.

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Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF OF PETITIONERS.

Opinion Below.

The opinion of the District Court has not been officially reported; it appears at pp. 97-99 of the Record.

Jurisdiction.

Jurisdiction of this Court is invoked under §262 of the Judicial Code (36 Stat. 1162, 28 U. S. C. §377). Review by common law writ of certiorari is sought in aid of the ultimate appellate jurisdiction of this Court conferred by §2 of the Expediting Act (32 Stat. 823, 15 U. S. C. §29).

Pursuant to the direction made at the time of the granting of the writ, the appropriateness of such review at the present stage of the case is discussed under Point I below.

Statement of the Case.

The order to be reviewed is one entered in the District Court on April 3, 1945 in a suit in equity brought by the United States against the petitioners and others for injunctive relief against alleged violations of the Sherman Act[1] and the Wilson Tariff Act[2] (R. 99-102). The order, which is styled a "preliminary injunction", requires that all the property of the petitioners found in the United States at the time of the institution of the action be sequestered and held during the pendency of the action and until the petitioners shall have complied with "all orders and decrees which may be or have been rendered against them in this cause" (R. 101 f. 301).

The purpose of the sequestration is to provide a fund to be held for an indefinite period of time as security for the performance of any decree that may be entered if the respondent is ultimately successful in the action. The order was entered before the determination of any of the issues in the action and before the petitioners' time to answer had expired. The petitioners have property in the United States affected by the order aggregating in value some $779,000 (R. 45-46, 49).

The business involved in the action is the production and sale of rough diamonds. The petitioner Societe Internationale Forestiere et Miniere du Congo (commonly known as "Forminiere") is a corporation organized under the laws of the Belgian Congo; the petitioner Companhia de Diamantes de Angola (commonly known as "Diamang") is a Portuguese corporation. They are engaged in the business of mining diamonds in Africa. The principal

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[1] 26 Stat. 209, 15 U. S. C. §§1, 2, 4.

[2] 28 Stat. 570, 15 U. S. C. §§8, 9.

ground of complaint is the allegation that the producers of diamonds in Africa, including the petitioners, have agreed to sell their entire output to a South African corporation known as Diamond Corporation, Ltd., one of the defendants in the action, and refuse to sell to others. This method of doing business is alleged to restrain the importation of diamonds into the United States and to enhance prices upon such importation (R. 12-13).

Simultaneously with the institution of the action—on January 29, 1945—the respondent filed its motion for the order under review (R. 34) and it also obtained *ex parte* a "temporary restraining order" substantially similar in effect to the "preliminary injunction" later entered (R. 30). After adjournments to permit the petitioners and other foreign corporate defendants to retain counsel in the United States, the motion came on for hearing before Honorable Samuel Mandelbaum, District Judge.[1]

The respondent's motion was based upon the allegations of the complaint, verified on information and belief by a Special Assistant to the Attorney General, and upon affidavits of the same Special Assistant alleging simply

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[1] The petitioners appeared specially for the purpose of opposing the motion and expressly reserved their right to move to dismiss the complaint on the ground that they were not subject to the jurisdiction of the Court (R. 91, 92). The determination of such a motion will be necessarily delayed because of the time involved in obtaining the affidavits and other evidence from the headquarters of the companies. During the argument of the motion for preliminary injunction the question of jurisdiction over the parties was adverted to and the respondent sought to make a preliminary showing on the point by submitting an affidavit of a Special Assistant to the Attorney General (R. 54). Although the petitioners were not prepared to present the matter fully they submitted certain affidavits in answer to that of the Special Assistant (R. 66, 71, 76, 82, 90, 91). The District Court did not pass upon the question of jurisdiction over the parties (R. 98) and petitioners now have pending their motion to dismiss and steps are being taken to obtain the necessary evidence for submission of those motions.

that "The principal businesses and activities of said defendants are carried on in foreign countries and they could quickly withdraw their assets from the United States and so prevent enforcement of any order or decree which the Court may render," and that "the foreign corporate defendants named herein have endeavored to avoid subjecting themselves to the jurisdiction of the courts of the United States by making their sales abroad only and requiring customers to pay in advance for all purchases" (R. 32, 33).

The property of the petitioners affected by the order consists of credits established with New York banks for the purpose of buying machinery and supplies to be used in the operation of mines in Africa, together with a quantity of such machinery and supplies which had been purchased but not yet shipped. In normal times the petitioners obtained the greater part of their mining equipment in Europe or Africa but because of war conditions it has been necessary for them to turn to the United States market for these materials and they have transmitted substantial funds to this country for that purpose (R. 45, 48, 79, 88). In the case of Forminiere, the bank credits affected by the order aggregate approximately $632,000, and the machinery and supplies purchased have a value of approximately $45,000 (R. 45-46). The bank credits of Diamang aggregate approximately $47,000, and the materials purchased amount to some $55,000 (R. 49).

This property is not in any way the subject matter of the action and the respondent does not contend that there is anything unlawful in either the ownership or the intended use of the funds and materials. The contention is rather, as stated in the motion, that "sequestration of said property is the only means of enforcing this Court's orders

or decree against said foreign corporate defendants" (R. 34).

The petitioners are suffering great and irreparable injury in being deprived of the use of these funds and materials. The machinery and supplies sought to be purchased in the United States are intended to be used for the production of industrial diamonds, which are important to Allied war production and for which there is now an unprecedented demand. Such purchases have been interrupted by inability to make use of the funds brought to the United States for that purpose. The fact that the order as it now stands does not apply to such funds as the petitioners may be able to bring to the United States after January 29, 1945, does not mitigate the hardship. Funds and property of great value have been rendered useless for an indefinite period, and the obtaining and transmission of dollar exchange in foreign countries is extremely difficult in time of war.

Summary of Argument.

As to the Writ.

The Court has power to review the order of the District Court under §262 of the Judicial Code, in the exercise of its ultimate jurisdiction to review decisions in anti-trust cases brought by the United States. The order is one which ought to be subjected to appellate review because of its serious effect upon the petitioners and because of the importance and novelty of the questions involved in the decision. Such review, to be effective, must be obtained at the present stage of the case, because the order will be beyond correction when the case comes to final decree. The only remedy is the common law writ of certiorari, unless it is to be held that an appeal will lie to

the Circuit Court of Appeals under §129 of the Judicial Code. Neither the Expediting Act nor the policy which it serves requires the denial of prompt appellate review of the order.

As to the Merits.

The order is not designed to protect or preserve the subject matter of the action or any right of the respondent and is merely a means of exacting from the petitioners security for the performance of the decree if the respondent ultimately prevails in the action. The order therefore performs the office of an attachment or sequestration rather than an injunction.

Under Rule 64 of the Rules of Civil Procedure the availability of such a remedy is governed by the law of the State where the action is pending (New York) in the absence of any Federal statute creating such a remedy. Neither the law of New York nor any Federal statute permits the requirement of security in such a case. The fact that the order is denominated a "preliminary injunction" does not enlarge the power of the Court because Rule 64 governs the requirement of security by attachment or sequestration "or other corresponding or equivalent remedies, however designated * * *." No precedent has been found in any court for such an order.

Even if the remedy were available upon a proper showing, the granting of it in this case would constitute an abuse of discretion because of the remote and fanciful nature of the reasons asserted for the application and the unwarranted injury which it imposes upon the petitioners.

The relevant parts of such statutes as are deemed to have an important bearing are quoted in the argument.

ARGUMENT.

POINT I.

Review of the order at this stage of the case by writ of certiorari under §262 of the Judicial Code is appropriate.

A. The Court has power to grant the writ.

The pertinent language of §262 of the Judicial Code (36 Stat. 1162, 28 U. S. C. §377) is as follows:

> "• • • The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

The issuance of such writs must, of course, be in the exercise of this Court's appellate jurisdiction. Such jurisdiction is defined by §2 of the Expediting Act (32 Stat. 823; 15 U. S. C. §29), which provides:

> "In every suit in equity brought in any district court of the United States under sections 1-7 of this title," [*i.e.* the Anti-Trust statutes] "wherein the United States is complainant, an appeal from the final decree of the district court will lie only to the Supreme Court and must be taken within sixty days from the entry thereof: • • •"

Upon the construction of this Act stated in *United States* v. *California Cooperative Canneries*, 279 U. S. 553, 558 (1929), the Supreme Court is vested with the ultimate and exclusive jurisdiction to review such cases.

The power to issue the writ does not depend upon the existence of an appellate jurisdiction which can be "imme-

diately and directly invoked", but rather rests "upon the ultimate power" of this Court "to review the case itself", *Ex Parte United States*, 287 U. S. 241, 246 (1932). The issuance of the writ in this case enables the Court to "accelerate its own undoubted reviewing authority" and is therefore supported by the decision as well as by the dissenting opinion in *Ex Parte Peru*, 318 U. S. 578, 591 (1943).

B. The order is one which ought to be reviewed at the present stage of the case.

The order of the District Court deprives the petitioners of the use of three quarters of a million dollars for a period which will necessarily be protracted (R. 45, 46, 49); it interferes with the acquisition of materials and supplies which it is both lawful and desirable that the petitioners be permitted to acquire (R. 46, 47, 49); and it may subject the petitioners to substantial liabilities to suppliers with whom contracts have been made for the manufacture of machinery and equipment (R. 46, 47, 49). Judicial action having such drastic consequences ought, in the interests of justice, to be subjected to prompt appellate review.

The questions presented are not merely of serious concern to the petitioners; they are important questions of Federal law which may affect the course of a considerable volume of litigation, and as to which the decision of the District Court appears to be inconsistent with the Rules of Civil Procedure and with the decisions of other Federal courts in similar matters. The order requires, in effect, that parties against whom no finding has been made and who have not even had an opportunity to answer the complaint shall hold all of their assets found within the jurisdiction at the time of the institution of the action as security for the performance of the final decree to be entered if the respondent is ultimately successful in the action. As will be shown

below, such an order is without precedent in any of the courts of this country or of England and relief of a comparable nature has been denied by other Federal courts. If such an order may be made upon the mere assertion that defendants are non-residents and could withdraw their assets, it will doubtless be sought in many cases of both a public and private nature; see, for example, *Guth* v. *Graves*, 44 F. Supp. 851, 854 (S. D. N. Y. 1942) where the Court said: "Certainly, if injunctions may be issued to insure the payment of judgments at the end of litigation, such relief would be sought in every case."

Postponement of review of the order until after final decree would be in fact a denial of any review at all. If the order remains in effect until final decree it will have spent its force and the damage done by it will be beyond repair. This is true of most preliminary injunctions and is the reason why Congress has provided generally for immediate appeals from interlocutory orders granting preliminary injunctions (Judicial Code, §129, 26 Stat. 828, 28 U. S. C. §227). As was stated by this Court in *Cobbledick* v. *United States*, 309 U. S. 323, 324 (1940), the requirement of finality as a prerequisite to appeal is departed from in such a case because "observance of it would practically defeat the right to any review at all."

C. Review of the order at this time would not be inconsistent with the provisions of the Expediting Act or the policy underlying that Act.

Prior to the adoption of the Expediting Act the parties to an equity suit brought under the anti-trust laws by the United States had the right of appeal to the Circuit Court of Appeals from the final decree. Judicial Code §128 (26 Stat. 828, 28 U. S. C. §225). They also had the right of appeal, to the same court, from interlocutory orders or

decrees granting or denying preliminary injunctions. This latter right is set forth in §129 of the Judicial Code (26 Stat. 828, 28 U. S. C. §227) applying to civil actions generally as follows:

> "Where, upon a hearing in a district court, or by a judge thereof in vacation, an injunction is granted, continued, modified, refused, or dissolved by an interlocutory order or decree, or an application to dissolve or modify an injunction is refused, • • • an appeal may be taken from such interlocutory order or decree to the circuit court of appeals; and sections 346 and 347 of this title shall apply to such cases in the circuit courts of appeals as to other cases therein. The appeal to the circuit court of appeals must be applied for within thirty days from the entry of such order or decree, and shall take precedence in the appellate court; and the proceedings in other respects in the district court shall not be stayed during the pendency of such appeal unless otherwise ordered by the court, or the appellate court, or a judge thereof. The district court, may, in its discretion, require an additional bond as a condition of the appeal."

The Expediting Act (p. 7, *supra*), designed to eliminate delay in the determination of anti-trust cases brought by the United States, made two direct and specific changes in the law relating to appeals. It substituted a direct appeal to this Court from the final decree of the District Court in the place of the right of appeal to the Circuit Courts of Appeals which theretofore existed, and it shortened the time within which such appeals might be taken.

Since the Expediting Act dealt expressly with "an appeal from the final decree of the District Court", it may be doubted whether it had the effect of repealing by impli-

cation §129 of the Judicial Code which related to appeals from preliminary injunction orders. There is no apparent reason why such repeal should have been intended because appeals under §129 of the Judicial Code would not have the effect of impeding the progress of the main case. That section specifically provided that the appeal from an interlocutory order of injunction should not operate as a stay of proceedings in other respects in the District Court unless such a stay was specifically ordered, and it contained its own provisions for expediting such appeals by limiting the time within which they might be taken and by directing that they be given precedence over other matters in the appellate court. See *Ex Parte National Enameling & S. Co.*, 201 U. S. 156, 161-2 (1906).

In *United States* v. *California Coöperative Canneries*, 279 U. S. 553 (1929), the question of partial repeal of §129 of the Judicial Code was not before the Court and the order there being considered was one which probably would not have been appealable prior to the passage of the Expediting Act. Mr. Justice Brandeis, writing for the Court, stated this generalization as to the effect of the Act:

> "Thus, Congress limited the right of review to an appeal from the decree which disposed of all matters, see *Collins* v. *Miller*, 252 U. S. 364; and it precluded the possibility of an appeal to either court from an interlocutory decree" (279 U. S. 558).[1]

This construction of the Act gives it a more far-reaching effect than is required either by its explicit provisions or by its underlying purposes. We therefore suggest that, unless the question is regarded as closed, there is ground

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[1] See also *Allen Calculators, Inc.* v. *National Cash Register Co.*, 322 U. S. 137 (1944); *Missouri-Kansas Pipe Line Co.* v. *United States*, 108 F. (2d) 614 (C. C. A. 3d, 1939), cert. den. 309 U. S. 687.

for holding that an appeal from preliminary injunction orders will lie to the Circuit Court of Appeals notwithstanding the provisions of the Expediting Act.

If this view be incorrect, we then have the question whether the Expediting Act repealed *pro tanto* not only §129 of the Judicial Code but also §262 thereof so as to impair the power of this Court to issue writs to review interlocutory orders in aid of its appellate jurisdiction. This would be carrying the Expediting Act far beyond its reasonable intendment. If the effect of the Act has been to vest in this Court the sole and exclusive appellate jurisdiction in equity suits brought by the United States under the Anti-Trust Law, then there is stronger necessity for the preservation of the power of this Court to issue writs under §262 than there would be if there remained some appellate jurisdiction in the intermediate courts. Repeals by implication are never favored, and this doctrine applies with particular force in questions as to the jurisdiction of an appellate court to issue writs of certiorari in the interests of justice. *Ex parte Peru*, 318 U. S. 578, 585 note 4 (1943). See also HARRIS, LAW OF CERTIORARI (1893) 4, 5.

There are compelling reasons why the power of the Court under Section 262 of the Judicial Code should be exercised in this case, even if the Expediting Act be construed as precluding any appeal until after the decree finally disposing of the case. The order of the District Court is designed to deprive the petitioners of the use of their property until final decree. The invasion of right involved in the order is that deprivation. If review is postponed until after final decree there will be nothing that any appellate court can do to correct the error. The case, therefore, is unlike *Roche* v. *Evaporated Milk Ass'n.*, 319 U. S. 21 (1943), because in that case the error, if any, involved in the interlocutory rulings could be fully corrected

upon the statutory appeal from the final judgment. Another important difference is that the extraordinary review sought in the *Roche* case would necessarily interrupt the progress of the case, which is not true of the writ now before the Court.

The writ of certiorari was historically used "in furtherance of justice" to provide review where the ordinary remedy of appeal or writ of error was unavailable or inadequate. *In Re Chetwood,* 165 U. S. 443, 462 (1897). For an instance in State practice of the use of certiorari to review an interlocutory order in a situation where the statutory right of appeal from the final decree would be too long postponed to be effective, see *Hyde* v. *Superior Court,* 28 R. I. 204, 66 Atl. 292 (1907) as explained in *MacKenzie & Shea* v. *Rhode Island Hospital Trust Co.,* 45 R. I. 107, 122 Atl. 774 (1923).

POINT II.

The order of the District Court exacting security from the petitioners for the performance of a possible future decree was beyond the powers of a Federal court of equity.

Although the order of the District Court is denominated a preliminary injunction, the respondent does not deny that the order is in substance and effect a requirement that the petitioners furnish security for the performance of any decree which may ultimately be entered in the action. The property of the petitioners is not the subject matter of the action; and the order is therefore not designed to preserve or protect that subject matter. The possession and use of the property is not claimed to be unlawful; and the order is therefore not intended to prevent and restrain

violations of law. The true purpose and effect of the order are found in its own requirement that the property of the petitioners be held "until this case has been finally determined and said foreign corporate defendants have complied with all orders and decrees which may be or have been rendered against them in this cause * * *" (R. 101).

The availability of remedies for securing satisfaction of a judgment is governed by Rule 64 of the Rules of Civil Procedure, as follows:

> "At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held, existing at the time the remedy is sought, subject to the following qualifications: (1) any existing statute of the United States governs to the extent to which it is applicable; (2) the action in which any of the foregoing remedies is used shall be commenced and prosecuted or, if removed from a state court, shall be prosecuted after removal, pursuant to these rules. The remedies thus available include arrest, attachment, garnishment, replevin, sequestration, and other corresponding or equivalent remedies, however designated and regardless of whether by state procedure the remedy is ancillary to an action or must be obtained by an independent action."

A. Neither the law of New York nor any Federal statute permits the seizure or impounding of property in an action in equity as security for a decree which may be entered.

The process provided by the law of New York for obtaining security prior to judgment in an action is the

warrant of attachment. This remedy is permitted only in actions brought solely for the recovery of a sum of money. The New York Civil Practice Act, Section 902, provides that

> "A warrant of attachment against the property of one or more defendants may be granted upon the application of the plaintiff, as specified in the next section, in any action for the recovery of a sum of money only."

It is well settled that attachment will not lie in an action of an equitable nature, whether or not the defendants are non-residents. *Thorington* v. *Merrick*, 101 N. Y. 5 (1885).

The respondent's motion seeks to justify the requirement of security by the assertion that "sequestration of said property is the only means of enforcing this Court's orders or decree against said foreign corporate defendants." But sequestration is not available under the laws of New York prior to an adjudication of liability. There is no statute permitting sequestration in such a case as the present one, and that remedy would be available, if at all, only as a contempt process, to be employed after some order or decree has been entered against the defendant and he has failed to obey it. See *Hosack* v. *Rogers*, 11 Paige 603 (1845). This is in accordance with the universally accepted principles of chancery both in England and in this Country. See *Pratt* v. *Inman*, 43 Ch. Div. 175, 179 (1889); *Hulbert & Crowe* v. *Cathcart* [1894] 1 Q. B. 244; *Skinner* v. *Educational Pictures Securities Corporation*, 14 Del. Ch. 417, 129 Atl. 857 (1925); *Roberts* v. *Stone*, 18 Mo. 481 (1853).

The matter of security for performance of a decree is not dealt with in any Federal statute. The only provision for either attachment or sequestration in civil actions is

that found in Rule 70 of the Rules of Civil Procedure, which provides in part:

> "If a judgment directs a party to execute a conveyance of land or to deliver deeds or other documents or to perform any other specific act and the party fails to comply within the time specified, the court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court and the act when so done has like effect as if done by the party. On application of the party entitled to performance, the clerk shall issue a writ of attachment or sequestration against the property of the disobedient party to compel obedience to the judgment."

This rule is similar to the former Equity Rules 7 and 8 under which it was held that

> "* * * there must have been a judicial act of some kind determining some issue in the case before such a drastic writ may be allowed." *Ross* v. *Grafton Power Co.*, 60 F. (2d) 663 (D. Vt., 1932). See to same effect *Martin* v. *James B. Berry Sons' Co.*, 83 F. (2d) 857 (C. C. A. 1st, 1936).

B. The power of the Court is not enlarged by describing the exaction of security as a "preliminary injunction".

It is contended by the respondent that the requirement of security is justified by reason of the fact that the order is cast in the form of an injunction rather than an attachment or sequestration. This contention assumes that form is more important than substance and that the limitations and safeguards placed around these drastic remedies may be circumvented by the careful use of words. The answer is provided in the language of Rule 64 itself which provides that the remedies for seizure of person or property for the purpose of securing satisfaction of a judgment in-

clude not only attachment and sequestration but also "other corresponding or equivalent remedies, however designated * * *."

The matter was well stated as follows by Chancellor Wolcott in *Cities Service Co.* v. *McDowell*, 13 Del. Ch. 109, 116 Atl. 4, 9 (1922), where an attempt was made, upon the institution of an equity suit, to obtain an injunction against the transfer by the defendant of property which was not the subject matter of the suit:

> "After all, though the complainant disclaims his contention to be such, the real question presented is this, viz.: May the writ of injunction be employed in equity to accomplish the same purpose which is served by the writ of foreign attachment at law?
>
> * * * * * * *
>
> "Injunctive relief may be granted on various grounds. In a general way, it may be said that two classes of cases call for its application: First, where, for instance, irreparable injury is threatened, or some forbidden act is about to be done by corporate or municipal officers, in cases of which kind the preventive aid of equity is the ultimate relief sought; and second, where the injunction is sought not as the ultimate and only relief, but in aid of some primary equity which the bill sets up.
>
> "This case clearly does not fall in the first class; and as to the so-called innocent shares of stock, the case clearly does not fall in the second class, for with respect to these the bill sets up no equity whatever. No lien is charged against them and no fraud is imputed to them. They are in no wise related to the controversy. They can be of no possible concern in this suit until the stage thereof is reached where a decree is made. At that time, if the decree should be for the complainant, these so-called innocent shares might in some way be sought in satis-

faction of the decree. Assuming that this could be done, then the injunction in equity would be used similarly to and as broadly as the mesne process of attachment at law. At least in substance it would be so. The writ of injunction cannot be used in this manner. Its issuance must be predicated on the existence of some equity. The anticipatory desire to aid the enforcement of a possible future decree, standing alone, has never been recognized as constituting such an equity."

As was stated in the foregoing opinion, one of the principal uses of the writ of injunction is to grant, *pendente lite*, relief of the character to which the complainant asserts that he is ultimately entitled. Such a case was *Ohio Oil Co.* v. *Conway*, 279 U. S. 813 (1929). Another recognized office of a preliminary injunction is to protect and preserve the subject matter of the suit until final adjudication. Such a case was *Deckert* v. *Independence Shares Corporation*, 311 U. S. 282 (1940), where the complainants asserted a trust upon a fund and sought to have the fund administered in equity for the benefit of the alleged *cestuis*. In that case a preliminary injunction against dissipation of the alleged trust fund was granted.

These uses of preliminary injunction in chancery practice are an exercise of the court's power to prevent infringement of some *right* of the complainant: "to protect any right of property, to enforce any obligation, or to prevent any wrong, * * *" (POMEROY, EQUITY JURISPRUDENCE, 5th Edition, 1941, Vol. IV, Sections 1338 et seq.). The chancery jurisdiction does not go to the length of creating a new right in the complainant, such as the right to have security for the performance of a decree *in personam* that may ultimately be entered.

Section 4 of the Sherman Act, (26 Stat. 209, 15 USC § 4) after providing that "the several district courts of the United States are invested with jurisdiction to prevent and restrain violations of", the substantive provisions of the Act, authorizes the Court at any time to "make such temporary restraining order or prohibition as shall be deemed just in the premises." Preliminary injunctions issued under this Section have uniformly been designed to "prevent and restrain violations" pending final determination of the issues, and there is no precedent for the extension of such injunctions to uses other than those sanctioned by equitable principles.

Similarly, the issuance of writs under Section 262 of the Judicial Code has uniformly been in accordance with "the usages and principles of law," as is explicitly required by that Section. The use of any writ, whether it be denominated attachment or sequestration or injunction, to exact security for the performance of a decree possibly to be entered in a suit in equity, would be contrary to the usages and principles of law.

The respondent has not been able to cite a single precedent, and we have found none, in any of the Federal or State courts or in the courts of England for the requirement of security by injunction against the transfer of property which is not itself the subject matter of the action. Every attempt to obtain such relief has been denied. See *Wahlgren* v. *Bausch & Lomb Optical Company*, 77 F. (2d) 121 (C. C. A. 7th, 1935); *Guth* v. *Groves*, 44 F. Supp. 851 (S. D. N. Y., 1942); *Campbell* v. *Ernest*, 64 Hun 188, 19 N. Y. S. 123 (1892); *Platt* v. *Elias*, 101 App. Div. 518 (1905); *Nelson* v. *Smith*, 157 Ore. 292, 69 Pac. (2d) 1072 (1937).

POINT III.

Even if such a remedy were available, the granting of it in this case would constitute an abuse of discretion.

The order of the District Court was made upon the scantiest showing of any need therefor and with inadequate consideration of the consequences to the petitioners. For this reason the order would be erroneous even if it were within the proper scope of the equitable powers. The respondent submitted a complaint verified on information and belief by one who admittedly did not have knowledge of the facts, and affidavits which contained nothing more substantial than the assertion that the petitioners were foreign corporations and could withdraw their assets from the United States. Upon this showing it was said that the respondent would suffer irreparable injury if the petitioners were not required to immobilize all their assets in the United States for an indefinite period, because otherwise a decree against the petitioners could not be enforced.

Upon analysis it will be seen that the respondent is dealing with an entirely remote and conjectural contingency. If the petitioners are found to be subject to the jurisdiction of the District Court; if their methods of doing business are ultimately held to violate the laws of the United States; if they fail to obey any decree that may be entered against them; if fines are thereafter levied against them in contempt proceedings; and if those fines remain unpaid—then the respondent wishes to be assured of the existence of assets in this country which may be levied upon in satisfaction of the fines.

The assumption that the respondent will ultimately prevail in the action is subject to the gravest sort of doubt.

The petitioners produce diamonds in Africa and sell them to a South African corporation which operates in England. It is charged that they have sought to refrain from doing business within the United States, but that their business policies have affected the interests of the United States which is an important user of diamonds. A basic question exists whether the activities of these companies in Africa and Europe are subject to the laws of the United States. This question should, of course, be determined upon evidence and not upon the conclusory allegations and characterizations of the complaint. It is apparent, however, that the case is not one in which the ultimate success of the respondent is to be easily assumed.

A further fact bearing upon the reasonableness of the assumption that the respondent will have to seek means of collecting fines imposed against the petitioners in contempt proceedings is that the petitioners are not outlaws; they are substantial and highly reputable enterprises. Forminiere is largely owned by the Government of the Belgian Congo, which holds 55% of its outstanding stock (R. 84).* The Government of Portugal holds a substantial interest in the profits of Diamang (R. 87). Corporations of such standing and operating under such auspices are not likely to flout decrees validly entered against them.

In order to provide the security which the respondent seeks, the petitioners are to be deprived of the use of property valued at over $700,000 for a considerable period of time. This property is lawfully possessed and the respondent claims no interest in it. Use of the property by the petitioners would violate no law and would impair no right of the respondent. Inability to make use of this

* The respondent's allegation that this is non-voting stock (R. 54) appears to be incorrect (R. 84).

large fund has interrupted important and desirable purchases and may subject the petitioners to substantial liabilities.

The respondent seeks to belittle the injury being done to the petitioners by asserting that a surety bond could be posted in substitution for the impounded fund. If the respondent is not entitled to the injunction, it is obviously not entitled to a bond. Apart from this, the practical difficulties under present conditions in the way of furnishing such an unusual undertaking are apparent, and neither the parties nor the District Court thought it worthwhile to make any provision in the order for the posting of a bond.

The effect of the order therefore is to impose a heavy penalty upon parties who have not been found to have violated any law, in order to provide against a remote and uncertain contingency. Such an imposition has no precedent or justification in our law.

Conclusion.

The order of the District Court should be reversed.

Respectfully submitted,

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